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No. 110.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1955

AMERICAN AIRLINES, Inc., *Petitioner*,

v.

NORTH AMERICAN AIRLINES, Inc., *Respondent*.

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit, not yet reported, appears at pages 411-435 of the Record. The opinion of the Civil Aeronautics Board, together with those findings of its Examiner as were specifically adopted by the Board, appears at pages 199-229 of the Record, and the full Initial Decision of the Examiner appears at pages 183-199 of the Record.

JURISDICTION

The judgment of the Court of Appeals was entered on June 23, 1955 (R. 437). The petition for writ of certiorari was filed on September 21, 1955, and was granted on November 14, 1955. The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Under Section 411 of the Civil Aeronautics Act (49 U.S.C. § 491), the Civil Aeronautics Board "may, . . . if it determines that such action by it would be in the interest of the public, investigate and determine whether any air carrier . . . has been or is engaged in unfair or deceptive practices or unfair methods of competition." If, after notice and hearing, the Board finds that the carrier is engaged therein the Board shall order the carrier "to cease and desist from such practices or methods of competition." Here, in a Section 411 proceeding, the Board ordered the respondent "to cease and desist from engaging in air transportation under the name North American . . . or any other name which includes the word American." The order was based on substantial evidence and findings disclosing that respondent's recently adopted name of "North American Airlines" is confusingly similar to petitioner's long-established and well-known name of "American Airlines" and that respondent's use of such name causes the public serious and widespread confusion and inconvenience by checking in with the wrong carrier, attempting to purchase transportation from the wrong carrier, meeting flights of the wrong carrier, and otherwise. The questions presented are:

1. Did the findings of widespread and serious public confusion from the use of a similar name

fall short of showing "unfair or deceptive practices or unfair methods of competition", and is it essential to such a showing that it be found that respondent was guilty of fraudulent intent to deceive or of palming off and had injured a competitor?

2. When reached after full and fair hearing and argument, with the factors affecting the public explicitly weighed in a considered agency opinion fully supported by the officer who heard the evidence, is the Board's determination that this proceeding is "in the interest of the public," in that its object is to correct and avoid wasteful and harmful inconvenience to passengers and prospective passengers in the operation of air carrier service, open to veto by a court where the administrative action is taken by an agency especially charged by Congress with responsibility for protecting the public interest in air transportation?

STATUTE INVOLVED

Section 411 of the Civil Aeronautics Act, 52 Stat. 1003 (1938), as amended 66 Stat. 628 (1952), 49 U.S.C. § 491, reads as follows:

"The [Civil Aeronautics] Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive

practices or unfair methods of competition, it shall order such air carrier, foreign air carrier or ticket agent to cease and desist from such practices or methods of competition."

Pertinent excerpts from the similar Section 5 of the Federal Trade Commission Act are printed in the margin.¹

STATEMENT

The petitioner American Airlines, Inc. (hereinafter "American") and the respondent North American Airlines, Inc. (hereinafter "North American") are competing airlines (R. 171, 220). American is a scheduled airline operating pursuant to certificates of

¹ "Sec. 5, (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

"The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

"(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue . . . a complaint stating its charges If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this act, it shall make a report in writing and shall issue an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice." 38 Stat. 719 (1914), as amended, 52 Stat. 111 (1938), 52 Stat. 1028 (1938); 64 Stat. 21 (1950), 66 Stat. 632 (1952), 15 U.S.C. § 45.

public convenience and necessity issued under Section 401 of the Civil Aeronautics Act (49 U.S.C. § 481), and it provides both low cost air coach or air tourist service and first class service (R. 172, 232, 240). North American is a large irregular airline operating air coach service (Exh. AA-10; R. 175, 181) pursuant to a letter of registration issued under Section 416 of the Civil Aeronautics Act (49 U.S.C. § 496) (R. 171, 220).²

American and North American compete between New York, Chicago and Los Angeles (R. 220); one of the most heavily travelled air routes in the nation. Both carriers operate frequent and daily transcontinental air coach service (R. 104-105, 172, 277).³ In Los Angeles they operate from different airports. North American operates from the Burbank airport (R. 104) where its transcontinental service has been quite substantial (R. 104-105). American maintains a ticket office at the Burbank airport (R. 41) but its planes operate from the Inglewood (*i.e.*, the International) airport (Exh. AA-4; R. 103, 157).

North American also operates between New York and Miami (R. 117); American does not serve Miami (Exh. AA-5; R. 103, 160).

The petitioner was incorporated in 1934 under its present name, and ever since has engaged in extensive air carrier service under the name of American Airlines (R. 220). Its predecessor operated under the

² Section 416 empowers the Board to exempt air carriers from any requirement of Title IV of the Act. The Board has exempted carriers operating irregular service from the requirement of a certificate of convenience and necessity in Section 401 of that Title. Such carriers operating large transport craft are styled large irregular carriers. They are issued letters of registration as evidence of their exemptions.

name American Airways beginning in 1930 and continuing up to the incorporation of the petitioner (R. 220). In 1949 petitioner registered the words "American Airlines" on the Patent Office's Principal Register as a service mark used in air transportation.³ In the words of respondent's counsel, American Airlines is "considered, I think, by a great part of the travel-

³ This mark now has the protection afforded by the incontestability provision in Section 15 of the Lanham Trade-Mark Act, 60 Stat. 433 (1946), 15 U.S.C. § 1065. This Act, which vastly expanded the federal protection afforded to registered marks, did not become effective until July 5, 1947, and the processing of applications was at first slow. Petitioner's application for registration was filed July 27, 1948 and was granted on August 23, 1949. (Exh. AA-3; R. 147-148, 171). Immediately after registration, Section 33(a) of the Act, 15 U.S.C. § 1115(a), makes the registration certificate "prima facie evidence of registrant's exclusive right" to the mark and thereby puts the burden of proof on the one who is denying the validity of the mark, even though all "legal or equitable defenses" are not foreclosed during the first five years. That was the situation here at the time of the hearing before the Examiner in March 1953. But the five year period of continuous use after registration required by Section 15 has now expired, and public documents at the Patent Office indicate that petitioner on January 14, 1955, complied with the necessary filing requirements of Sections 8 and 15 of the Act which bring the incontestability provision into effect. Section 33(b) of the Act, 15 U.S.C. § 1115(b), provides that where, as here, a mark has become incontestable under Section 15, the certificate of registration "shall be conclusive evidence of the registrant's exclusive right to use the registered mark". Accordingly, since it could never even be suggested that the name "American Airlines" was registered fraudulently or is otherwise defective as set forth in the provisos to Section 33(b), in a judicial proceeding any contention that the mark "American Airlines" is invalid, or is "merely a geographical" term and does not have a secondary meaning referring to petitioner, would be precluded as a matter of law.

ing public the top airline, the best known airline, in the United States" (R. 83).

The respondent is a North Carolina corporation, but its principal office is at Los Angeles, California (R. 1). The respondent applied to the Civil Aeronautics Board for, and was issued on July 22, 1947, a letter of registration in the name of Twentieth Century Airlines, Inc., which was then respondent's corporate name (R. 3-4).

Without making any effort to change its name in the letter of registration and without notifying the Board, respondent on April 21, 1951, began offering air transportation services to the public under the fictitious name of North American Airlines (R. 220, 308-309). In accordance with a California law,⁴ respondent on May 21, 1951, filed in the Office of the Clerk of the County of Los Angeles a certificate of conducting business under this fictitious name (R. 1), but it was almost a year later, on March 3, 1952, when its articles of incorporation were amended so as to change its name to North American Airlines, Inc. (R. 1, 309). Thereafter, respondent sent the Board a letter dated March 11, 1952, advising of the change in corporate name and suggesting reissue of the letter of registration in the new name (R. 173).

On August 19, 1952, the Board adopted its Business Name Regulation. The validity of this regulation is not here in question. In substance, it provides that an air carrier,⁹ in dealing with the public and in perform-

⁴ Cal. Civ. Code § 2466. This law was designed to prohibit fly-by-night debtors from escaping their lawful obligations. Cf. Bank & Trust Co. v. Gearhart, 45 Cal. App. 421, 423, 187 Pac. 989, 990 (1st Dist. 1920).

ing air transportation services, must secure permission of the Board to use any name different from the name in its operating authority.⁵

In the preamble of the regulation, the Board observed that, until the relatively recent past, "most carriers were in fact doing business under their official name without any compulsion to do so" (R. 295). The Board noted that there had been an "increasing tendency, particularly among some of the large irregular carriers, to use names different from those in which operating authority is granted by the Board", a practice which the Board found had "resulted in confusion in the minds of the public, an increase in the administrative burden of the Board, and greater difficulty in achieving adequate enforcement of the Act and the regulations" (R. 295). The Board announced, however, that where a different name had already been used by a carrier to build up good will, such name would be barred only if its use were found after notice and hearing to contravene Section 411 of the Civil Aeronautics Act (R. 297).⁶

⁵ The section of this regulation here involved appears as Part 291.28 of the Board's Economic Regulations (14 C.F.R. § 291.28), and is printed in the Record at pages 295-298. Several regulations, substantively identical, were adopted simultaneously, each regulation being applicable to a different type of carrier in accordance with the different types of operating authority. Thus, one regulation applies to carriers holding certificates of convenience and necessity (14 C.F.R. § 202.8), whereas another regulation governs large irregular carriers holding letters of registration (14 C.F.R. § 291.28).

⁶ The full text of this preamble to the regulation appears at pages 295-297 of the Record. The preamble was omitted when the regulation was compiled into the Code of Federal Regulations, 14 C.F.R. § 291.28.

On October 6, 1952, pursuant to this regulation, respondent applied to the Board for permission to use the name North American Airlines, Inc. (R. 1), and the proceeding on such application was assigned Docket No. 5774 (R. 3). The petitioner objected to the grant of the application and filed a memorandum of complaint alleging that the use of the name North American Airlines caused public confusion between respondent and petitioner and constituted an unfair or deceptive practice or unfair method of competition in violation of Section 411 of the Civil Aeronautics Act; the petitioner also submitted supporting affidavits (R. 5).

The Board considered the petitioner's complaint and concluded that it raised "important issues of fact and law which can be decided only after a hearing" (R. 5). Accordingly, on January 28, 1953, the Board issued an order directing the commencement of a proceeding to determine whether "North American has been and is engaging in activities and practices in violation of Section 411 of the Act, and if any such violation is established, whether the Board should issue an order directing North American to cease and desist from such violations" (R. 6). This proceeding was assigned Docket No. 5928. In this same order, the Board consolidated the Section 411 proceeding with the proceeding in Docket No. 5774 on respondent's application to change its official name, and both proceedings were set for hearing before one Examiner (R. 6). In another order, the petitioner was permitted to intervene and become a party to support the allegations in its complaint to the Board (R. 6-7).

The Board also provided that, pending final decision in the proceeding, respondent's continued use of the

North American name would not constitute a violation of the Business Name Regulation (R. 5). It is clear that the only issues in the proceeding were those arising under Section 411 of the Act (R. 209 n. 10).

At the ensuing hearing, both the petitioner (R. 221) and the respondent (R. 223) introduced evidence. Sixteen witnesses testified and numerous exhibits were received in evidence (R. iii-x). Likewise traffic surveys, carrier reports, schedules, and other statistical and documentary material were incorporated in the record by reference pursuant to stipulation (R. 172). The Board's Enforcement Attorney appeared (R. 7) and actively participated throughout the proceeding including its briefing and argument, although he did not sponsor any witnesses or exhibits.

After receiving briefs the Examiner issued an exhaustive Initial Decision finding that respondent's use and advertising of the name North American violated Section 411 of the Act (R. 184-199). Accordingly, the Examiner recommended that an order be entered requiring respondent "to cease and desist doing business in air transportation under the name North American Airlines, Inc. or any variation of the name 'American'" (R. 199).

The respondent filed exceptions with the Board, and after the normal procedure of briefing and oral argument (R. 200), the Board issued its opinion (R. 199-229). It specifically adopted (R. 201) and set forth in an appendix (R. 219-229) numerous of the findings made by the Examiner, and the Board made additional findings and conclusions of its own.

On the evidence the Board found that the public confused the respondent with the petitioner because of

the respondent's use of the names North American and North American Airlines and their similarity to the names American and American Airlines (R. 201-204). This confusion existed not only among passengers and persons inquiring for flight information, but even among merchants and creditors (R. 201-202)—though “The bulk of the confusion shown in the record was on the part of persons reasonably identified as prospective or actual purchasers of air transportation” (R. 202).

The Board further found that there was no doubt that the petitioner's long use and extensive advertising of the name American and American Airlines, and the common reference to the petitioner by the newspapers as American, had created a public understanding that, as used in connection with domestic air services, the words American and American Airlines signify the petitioner (R. 206-207, 220-221, 227).

Likewise, the Board squarely rejected the respondent's contention that the confusion was not “substantial or widespread” (R. 204-205). While the Board found it unnecessary to endorse the Examiner's numerical estimate that the instances of confusion in the Los Angeles area alone amounted to some 200 a week, its analysis of the evidence showed that the confusion was, indeed, substantial in amount and was not *de minimis* as the respondent had contended (R. 205-206); the evidence of confusion at both Los Angeles and New York was “abundant” (R. 201).

The nature of this widespread confusion was found by the Examiner, in findings adopted by the Board, as follows:

“The above evidence generally involved numerous inquiries on the part of the public made to

American employees concerning service, rates, routes, and schedules of North American under the mistaken impression that North American and American were one and the same airline.

"An officer of American testified that he had received from employees under his supervision numerous inquiries indicating confusion between American Airlines and North American Airlines, and that * * * his office had received a telephone call from a representative of a trade union, complaining that an American sign was being painted by non-union painters, and upon investigation it was found that the sign was that of North American. There were instances of air passengers holding North American tickets attempting to check in for North American flights at American ticket counters—in fact, at the Burbank office this was a daily occurrence—and many of the passengers were still confused after an explanation had been made that American and North American were two different airlines. There were instances where North American passengers attempted to claim their baggage at the American counter; also other instances where prospective passengers insisted they were entitled to a discount for transportation on American because they held a 'Buyers League Scrip Book.' Upon an investigation by the passengers making the inquiries, it was learned that it was North American instead of American which offered a discount.

"There were other instances of persons meeting incoming North American passengers who made inquiries at the American ticket counter at Burbank to determine time of arrival. Other inquiries were made of American agents at Los Angeles concerning an \$80 fare from Los Angeles to New York, which the persons had heard advertised on television, and upon investigation it

was found that it was North American they were referring to, and not American. One witness testified that she had heard people state that they were under the impression that North American and American were the same or affiliated companies. Another witness for American testified that one person insisted that American flew from New York to Miami because she had heard a radio program to that effect, whereas the program in question was that of North American. There were instances where mail addressed to North American was delivered to American Airlines' office. Tradesmen have dunned American for bills owed by North American and hotels have requested American's advice as to billing for hotel charges incurred by North American crews. A witness for American stated that at its Burbank office the president of North American, who is on duty at the North American ticket counter at Lockheed air terminal, informed her that many persons would stop at his counter and request tickets to Dallas, Oklahoma City, or Tulsa, points which North American did not serve, and he would realize that the passengers were confused and that they were under the impression it was American's ticket counter. *The president further stated to the witness that if the passengers were destined to New York or Chicago he would do everything he could to 'steal' them.*

"There were many other instances similar to those referred to above that need not be repeated here. In general, they indicate that certain confusion exists on the part of the public in distinguishing the services of the two airlines in question." (R. 221-223) (Emphasis added).

Finally the Board found:

"... the record is convincing that the public interest requires this action in order to prevent

further public confusion between respondent and intervenor due to similarity of names. The maintenance of high standards in dealing with the public is expected of common carriers, and the public has a right to be free of the inconveniences which flow from confusion between carriers engaging in the transportation of persons by air. The speed of air travel may well be diminished when passengers check in for flights with the wrong carrier, or attempt to purchase transportation from the wrong carrier, or direct their inquiries to the wrong carrier. Friends, relatives or business associates planning to meet passengers or seeking information on delayed arrivals are subject to annoyance or worse when confused as to the carrier involved. The proper handling of complaints from members of the public is impeded by confusion as to the carrier to whom the complaint should be presented. The transportation itself may differ from what the confused purchaser had anticipated (e.g., in terms of equipment), even though the time and place of arrival may be about the same. It is obvious that public confusion between air carriers operating between the same cities is adverse to the public interest, and we have determined that the public should be protected from the effects of the confusion shown on the record by eliminating what we find to be the cause of such confusion." (R. 208-209)

The Board concluded, as had its Examiner, that the respondent's use of the name "North American Airlines," "North American" or any combination of the word "American" constitutes an unfair or deceptive practice and an unfair method of competition (R. 210-211). Accordingly, it determined that the respondent and its agents should be ordered to cease and desist from engaging in air transportation under such names

(R. 211), and an appropriate order was entered (R. 229-230).

The respondent duly petitioned the lower court to review the Board's order. The petitioner intervened (R. 311).

The issues on the appeal were precisely defined by prehearing stipulation approved by the court (R. 306-311). They were limited to the following:

1. Did any combination of the Board's findings "establish a violation of Section 411, because of the use by the [respondent] of the name North American Airlines, Inc., North American Airlines or North American"?
2. Did the Board's findings "establish a secondary meaning connoting American Airlines, Inc., in the words 'American' and 'American Airlines' "?
3. Did the Board find that the respondent's use of the North American name was fraudulent?

The only other issues set forth in the agreed statement related to whether various of the findings as to the existence of confusion, its probability, etc., were supported by substantial evidence.⁷

The lower court had the case under consideration for just over a year. It did not agree with the respondent's

⁷ It will be observed that on the petition for review no issue was tendered bearing on the scope of the Board's order or its appropriateness as a means for remedying the Section 411 violation if such a violation were properly found to exist. Hence this case does not present the problem dealt with in *Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608, 613 (1946), as to whether some alternative form of order should have been entered.

attack on the findings of fact. Indeed, it quoted some of the findings and paraphrased others, and referred in summary to a part of the evidence (R. 413-416, 418). Rather it found that the Board erred in "the application of criteria which fell short of the public interest findings demanded by the law" (R. 418).

In essence, the lower court's view of what the law requires is disclosed in one paragraph of its opinion opening with a quotation of the following finding by the Examiner:

"There is no evidence of record that North American adopted its name with *intent to deceive* the public or trade upon the goodwill and business reputation of American, or that *American has been injured* by such operation . . ." (R. 417) (Emphasis added).

This negative finding of the Examiner had not been adopted by the Board, but the lower court concluded, from its examination of the record, that "the Examiner was correct"—and it was the lack of findings and of "evidence that North American palmed itself off as American", or that North American's "advertising was intended to or did entice American's passengers . . . or that American was harmed", that led the lower court to hold that the Board's order was not supported by "the public interest findings demanded by the law" (R. 417-418).

It is quite true that there was no attempt in the evidence to prove that the respondent had adopted its name with the intent to trade upon the petitioner's reputation or that it had deliberately sought to simulate petitioner through such devices as similarity of advertising format. The respondent had

argued that therefore it could not be held to be afoul of Section 411 of the Act. In response to this argument the Board commented that when the respondent had adopted its name it was fully aware of the petitioner's reputation, that operations between major cities served by the petitioner loomed large in respondent's contemplation, and that it was obvious that the name similarity "might well cause confusion" (R. 207). Hence, said the Board, the respondent's use of the name in question "was not accidental or inadvertent" (R. 207).^{*} In other words, the case is not like one where two companies in different areas have innocently adopted similar names and later come into the same market. But unquestionably, as the Examiner and the lower court observed, there was no effort to prove conventional fraud or palming off.

It is also true that there was no effort to prove that any specific passengers had actually purchased tickets on respondent intending to purchase tickets on petitioner. Rather the evidence and findings dealt with such situations as that of persons seeking reservations and flight information from the petitioner under the impression that the respondent and the petitioner were the same, coming to the petitioner's counter to check in for flights under the same impression, claiming baggage at the wrong office under the same impression,

^{*} Indeed, the Board noted that the respondent's own evidence showed that in its radio commercials it referred to itself by name as one of "the nation's four great airlines" and that this was not even remotely true of the respondent, whereas it was true of the petitioner, which is one of the four carriers "commonly referred to as the 'Big Four'" (R. 207-208, n. 8). The radio commercials had been introduced by the respondent in the form of recordings which it was permitted to withdraw subject to call (R. 114).

and so on. From all of this evidence it might well have been found that the petitioner had actually lost business to the respondent as a result of this confusion, but the Board made no such express finding and the ease was not dealt with by the Board on the theory that any such finding was necessary or particularly material. In fact the Board's findings evince little interest in any question of the extent of harm to the petitioner; they are concerned wholly with the confusion and inconvenience caused to the travelling public.

SUMMARY OF ARGUMENT

It is agreed that Section 411 of the Civil Aeronautics Act, under which this proceeding is brought, is at least as comprehensive as is its prototype, Section 5 of the Trade Commission Act.

The lower court relied on a rather ancient obiter dictum of this Court to the effect that there could be no "unfair method of competition" within the meaning of Section 5 of the Trade Commission Act unless there were a showing of fraud. This Court has long since repudiated that dictum by its decisions, and a long line of cases under Section 5 deny the necessity for any showing of fraud or of palming off in the conventional common law sense. The lower court also erred in its determination that the Board's order was defective because not supported by a finding that the similarity of the respondent's name to that of the petitioner had caused loss of business to the latter. The Wheeler-Lea Amendment to Section 5 of the Trade Commission Act, which is incorporated in Section 411 of the Civil Aeronautics Act, was specifically intended to legislate out of the law the requirement of a showing of competitive injury.

Trade name confusion is an accepted subject of concern to the Trade Commission. Nor is it necessary, to support a cease and desist order, that there be a showing even of actual confusion. Probability of confusion is sufficient.

The lower court also misapplied this Court's decision in the *Klesner* case.⁹ It viewed that case as warranting a court to substitute its own judgment for that of the Board in determining what is to the interest of the public.

Actually the *Klesner* case meant no more than that the Trade Commission, in initiating Section 5 proceedings, should be motivated by concern for the public and should not lend its processes simply to the settlement of private grudges. This Court should reconsider the holding in the *Klesner* case that the administrative determination as to what is in the interest of the public is reviewable in a court. But, in any event, that case should not be applicable to Section 411 of the Civil Aeronautics Act, for that Act confers upon the Board, to a special and peculiar extent, the responsibility for the determination of the public interest in matters affecting air transportation. Section 5 of the Trade Commission Act, under which the *Klesner* case was decided, imposes no such degree of reliance upon the special competence of the Commission.

However, even though the *Klesner* case were applicable here, the lower court plainly exceeded proper bounds for judicial review. The Board carefully and explicitly weighed the public's interest in the problem with which it dealt, the considerations moving it to action were of real public concern, and a court cannot override them with its own conceptions.

⁹ Federal Trade Commission v. Klesner, 280 U.S. 19 (1929).

I

THE COURT BELOW ERRED IN HOLDING THAT SECTION 411 OF THE CIVIL AERONAUTICS ACT IS CONFINED TO PRACTICES INVOLVING FRAUDULENT INTENT, PALMING OFF BY DECEPTION, AND INJURY TO A COMPETITOR.

The long dog-eared dictum from the *Gratz* case¹⁰ was freshened up by the lower court and became its principal reliance in striking down the Board's order (R. 423). The dictum was the well known remark of Mr. Justice McReynolds that the phrase "unfair method of competition" in Section 5 of the Trade Commission Act was "clearly inapplicable to practices never heretofore regarded as . . . deception, bad faith, fraud or oppression . . ."

While that dictum was over-reaching obiter,¹¹ it provided for some years effective ammunition for assaults upon the efforts of the Trade Commission. But after the October 1933 Term of this Court it was thought that the *Gratz* dictum had been laid quite at rest. Fifteen years ago Professor Handler stated categorically that *Federal Trade Commission v. Keppel & Bro.*, 291 U.S. 304 (1934), had overruled the *Gratz* remark. *Unfair Competition and the Federal Trade Commission*, 8 Geo. Wash. L. Rev. 399, 404

¹⁰ Federal Trade Commission v. Gratz, 253 U.S. 421, 427 (1920).

¹¹ Usually forgotten is the fact that what the Justice actually held, on behalf of a majority of the Court, was simply that insistence on selling together "such closely associated articles as ties and bagging" was in itself not wrongful, and that a complaint stated no case under Section 5 where it did no more than to allege such sales "without deception, misrepresentation, or oppression, and at fair prices, to purchasers willing to take it upon terms openly announced." 253 U.S. at 428.

(1940). Plainly the lower court found its guidance in the wrong precedent.

Even before the *Keppel* case, Mr. Justice Cardozo's opinion for a unanimous Court, during the same Term, in *Federal Trade Commission v. Algoma Co.*, 291 U.S. 67 (1934), had all but buried the *Gratz* dictum. There a Trade Commission order had been entered to prevent sale of Western yellow pine under the name "California white pine". The order was attacked, under the *Gratz* theory, on the ground, among others, that adoption of that name had been entirely innocent of any intent to deceive. 291 U.S. at 79. It was shown that the name had been extensively used in one section of the country for some thirty years and that even the Bureau of Standards had approved its use. 291 U.S. at 71, 74. But Mr. Justice Cardozo stated that, however innocently the name had been adopted, where it was found that it had the "capacity to deceive" the Commission could prevent its use even though the practice "does not amount to fraud". 291 U.S. at 81.

Then, in the *Keppel* case, Mr. Justice Stone, again for a unanimous Court, squarely rejected the *Gratz* theory. There the Commission had ordered a stop to the sale of penny candy involving an element of chance. The order was assaulted on the ground that there was no violation of any anti-lottery law and that everything was fully explained and above board so that there was not the slightest element of deception; and the *Gratz* dictum was the authority cited to the Court. The Court accepted, for the sake of argument, the proposition that there was no violation of any anti-lottery law and no element of deception. 291 U.S. at 309, 313. But it held, the Commission was not confined

to striking down practices amounting to common law unfair competition; the very purpose of using the phrase "unfair method of competition" in the Trade Commission Act was to reach beyond the traditional concepts of proscribed trade methods. 291 U.S. at 310-312. The Commission had a broad discretion, and its judgment was to be given great weight. 291 U.S. at 314. Hence the Commission was not limited to striking at practices involving fraud or deception.

Consistently, in dealing with Trade Commission orders, the Courts of Appeals, since the *Keppel* case, have rejected argument that Section 5 of the Trade Commission Act reaches only cases of fraud or palming off or similar deliberate deception. *Pep Boys—Manny, Moe and Jack v. Federal Trade Commission*, 122 F.2d 158, 161 (3rd Cir. 1941); *DDD Corp. v. Federal Trade Commission*, 125 F.2d 679, 682 (7th Cir. 1942); *Charles of the Ritz v. Federal Trade Commission*, 143 F.2d 676, 680 (2nd Cir. 1944); *Gimbel Bros. v. Federal Trade Commission*, 116 F.2d 578, 579 (2nd Cir. 1941); see *Koch v. Federal Trade Commission*, 206 F.2d 311, 319 (6th Cir. 1953). And see *Reilly v. Pinkus*, 338 U.S. 269, 277 (1949).

The lower court's effort to introduce into Section 411 of the Civil Aeronautics Act limitations rejected under the Trade Commission Act is error.¹²

Palpable error, too, is the lower court's holding that the Board's order is defective because there was no

¹² That Section 411 of the Civil Aeronautics Act is at least as broad as Section 5 of the Trade Commission Act is, of course, apparent on the face of the two statutory provisions. It was so found by the Examiner (R. 190), the Board (R. 224) and the Court of Appeals (R. 432), and the legislative history leaves no room for doubt (R. 421-422). And see note 14, *infra*, p. 23.

showing of actual loss of business suffered by the petitioner. It missed the significance of the Wheeler-Lea Amendment to the Trade Commission Act, for not only does the court emphasize the absence of a showing of competitive harm but it even summarizes *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643 (1931), which required a showing of competitive injury, as though that case remained the law. See the lower court's summary of the *Raladam* case (R. 433). But the competitive injury requirement of the *Raladam* case was legislated out of Section 5 of the Trade Commission Act by the Wheeler-Lea Amendment in 1938,¹³ the substance of which was included in the wording of Section 411 of the Civil Aeronautics Act a few weeks thereafter.¹⁴ Since 1938, an argument that an order such as is here in question should be set aside because no competitor has been hurt is "hardly worthy of serious or extended consideration." *Eugene Dietzgen Co. v. Federal Trade Commission*, 142 F.2d 321, 327 (7th Cir. 1944), cert. denied, 323 U.S. 730 (1944).

¹³ H. Rep. No. 1613, 75th Cong., 1st Sess. 3 (1937); *BEER, FEDERAL TRADE LAW AND PRACTICE* 79 (1942).

¹⁴ 52 Stat. 111 (1938). On April 6, 1938—a few days after the enactment on March 31, 1938 of the Wheeler-Lea Amendment to the Trade Commission Act—Senator Truman, Chairman of the subcommittee holding hearings on the aviation bills, introduced a bill with an amendment to the counterpart of Section 411 so that the section "conforms to the recent amendments of the Federal Trade Commission Act." Hearings before the Subcommittee of the Senate Committee on Interstate Commerce on S. 3659, 75th Cong., 3d Sess. 5 (1938); 83 Cong. Rec. 6726 (1938). See also, 83 Cong. Rec. 6431 (1938).

II

AN UNFAIR PRACTICE OR METHOD OF COMPETITION IS ABUNDANTLY DISCLOSED BY THE BOARD'S FINDINGS.

Section 411 of the Civil Aeronautics Act, in its second sentence, provides that if the Board finds an unfair or deceptive practice or unfair method of competition it shall order the carrier to cease and desist.

In the comparable Section 5 of the Trade Commission Act the phrase "unfair method of competition" covers not only common law unfair competition but a much wider range. This Court has been at pains to point out that Congress deliberately adopted a phrase that would not be held to the limits of the common law. *Federal Trade Commission v. Keppel & Bro.*, 291 U.S. 304, 310-312 (1934). Quite recently it again observed:

"... The 'unfair methods of competition' which are condemned by § 5(a) of the Act, are not confined to those that were illegal at common law or that were condemned by the Sherman Act. . . . Congress advisedly left the concept flexible to be defined with particularity by the myriad of cases from the field of business." *Federal Trade Commission v. Motion Picture Adv. Co.*, 344 U.S. 392, 394 (1953).

And when, by the Wheeler-Lea Amendment of 1938, Section 5 was extended to include unfair or deceptive practices, as well as unfair methods of competition; the Commission's power to proscribe was still further broadened. Section 411 of the Civil Aeronautics Act, especially when considered in its context of special regulation of a common carrier industry peculiarly

affected with a public interest, is at least as comprehensive as is Section 5 of the Trade Commission Act.

Advertising, however innocently adopted, which has the "capacity to deceive" is within the Commission's power to curb under Section 5. *Federal Trade Commission v. Algoma Co.*, 291 U.S. 67, 81 (1934). The use of a trade name is simply a form of advertising and is an accepted subject of Commission scrutiny.¹⁵ Moreover it is not necessary, to sustain a Commission order, that there be a showing of actual deception of the public; the likelihood of the public's being misled suffices. *Pep Boys—Manny, Moe and Jack v. Federal Trade Commission*, 122 F.2d 158, 161 (3rd Cir. 1941); *Charles of the Ritz v. Federal Trade Commission*, 143 F.2d 676, 680 (2nd Cir. 1944).¹⁶ And such likelihood

¹⁵ In 16 C.F.R. § 3.2240, there are listed 43 Trade Commission cases involving confusing trade names of business concerns, and in 16 C.F.R. § 3.2245 there are 34 cases, which include some repeats from the above category, of confusing trade names of products.

¹⁶ The rule is the same in common law unfair competition and trade-mark law. *E.g.*, *Standard Brands v. Smidler*, 151 F.2d 34, 37 (2d Cir. 1945) ("It was enough that an appreciable number of prospective purchasers were likely to be thus misled."); *United Drug Co. v. Obear-Nester Glass Co.*, 111 F.2d 997, 1000 (8th Cir. 1940), *cert. denied*, 311 U.S. 665 (1940) ("It is sufficient if the proof shows that purchasers are likely to be deceived or confused."); *Bunte Bros. v. Standard Chocolates*, 45 F. Supp. 478, 481 (D. Mass. 1942) ("... the basic question involved in all of them is whether there is likelihood of confusion."); *Esquire, Inc. v. Maira*, 101 F. Supp. 398, 402 (M.D. Pa. 1951) ("Evidence of specific instances of confusion is unnecessary."). See also, *Stork Restaurant v. Sahati*, 166 F.2d 348, 359 (9th Cir. 1948); *Majestic Mfg. Co. v. Kokenes*, 67 F. Supp. 282, 287 (N.D. Ala. 1946); NIMS, UNFAIR COMPETITION AND TRADE-MARKS 1049 (4th

may properly be determined by the Commission without testimony from consumers themselves. *Charles of the Ritz v. Federal Trade Commission, supra*; cf. *New American Library of W. L. v. Federal Trade Commission*, 213 F.2d 143 (2nd Cir. 1954). Actually, in making a judgment as to the likelihood of consumer confusion, the testimony of persons observing consumer behavior is especially revealing, and "without

ed. 1947). Moreover, in one of the most recent cases in this field the Court of Appeals reversed the District Court's refusal to enjoin because the "wrong thus consisted of the fact that such a visitor [at the home of a purchaser] would be likely to assume that the clock was an Atmos clock." *Mastercrafters C. & R. Co. v. Vacheron & Const. Le C^o W.*, 221 F.2d 464, 466 (2d Cir. 1955), *cert. denied*, 350 U.S. 832 (1955).

The Lanham Trade-Mark Act, 60 Stat. 427 (1946), 15 U.S.C. § 1051-1127, embodies the concept of probable public confusion as the key to registration and protection of trade-marks. Section 2(d) prohibits registration of any mark which so resembles a prior mark "as to be likely, when applied to the goods of the applicant, to cause confusion or mistake . . ." Similarly, Section 16 authorizes an interference proceeding on an application whenever the applied-for mark so resembles a prior mark "as to be likely . . . to cause confusion or mistake".

In this same connection, it is noteworthy that this Court, in dealing with the Trade Commission Act, has emphasized that it was the hope of the sponsors of the Act that its "effect might be prophylactic" and that it would stop in their incipency practices which, full-blown, would cause actual harm. *Fashion Guild v. Trade Commission*, 312 U.S. 457, 566 (1941); *Federal Trade Commission v. Motion Picture Adv. Co.*, 344 U.S. 392, 394-395 (1953). These teachings of this Court mean that the record need not contain the *corpus delicti* before the Board can enter a cease and desist order. Rather, there need be only a probability of confusion. The record here goes far beyond that.

this type of proof it would be difficult to show confusion."¹⁷

Even the common law of unfair competition has always been concerned with the use of a business name sufficiently similar to a previously established name as to create likelihood of consumer confusion. Injunctive relief is afforded, as distinguished from damages, even though the junior user is quite innocent of fraud or intent to deceive.¹⁸ The very name "American", where it has come to signify a particular company, service, or product, as was shown to be true in this case (*supra* p. 11), has often been protected against confusing similarity of use by others.¹⁹

¹⁷ *S. C. Johnson & Son v. Johnson*, 28 F. Supp. 744, 749 (W.D. N.Y. 1939), *relief mod. on appeal*, 116 F.2d 427 (2d Cir. 1940). See also, *Gehl v. Hebe Co.*, 276 Fed. 271, 272-273 (7th Cir. 1921) (consumer testimony "is not easily available, nor indeed necessary where the words themselves suggest it."). Particularly apt to the instant case is *Seattle Taxicab Co. v. De Jarlais*, 135 Wash. 60, 66, 236 Pac. 785, 787 (1925), wherein the court emphasized, in considering an argument based on the paucity of direct consumer testimony, that it must be "remembered that users of taxicabs are largely tourists and nonresidents, that no one likes to make complaint, and few will do so if the result is likely to involve them in matters which may interrupt their movements or delay the execution of their own plans . . ."

¹⁸ *E.g.*, *Stork-Restaurant v. Sahati*, 166 F.2d 348, 359-360 (9th Cir. 1948); *Navy Club v. All Navy Club*, 85 F. Supp. 679, 682 (D.R.I. 1949); *Household Finance Corp. v. General Finance Credit Corp.*, 49 F. Supp. 541, 542 (D.N.J. 1943).

¹⁹ *Shaver v. Heller & Merz Co.*, 108 Fed. 821, 824-825 (8th Cir. 1901) (*American Ball Blue and American Wash Blue*); *American Thread Co. v. North American Thread Co.*, 33 F. Supp. 616, 618 (S.D.N.Y. 1935); *Dennison Mfg. Co. v. Thomas Mfg. Co.*, 94 Fed. 651 (C.C. Del. 1899) (*American Express*); *American Home Benefit Assn., Inc. v. American Benefit Assn., Inc.*, 63 Idaho 754, 761-

In short, there was nothing trail blazing in the Board's order—as the lower court seemed to feel (R. 414-415). The practice proscribed was, indeed, a very close kin to common law unfair competition.

763, 125 P.2d 1010, 1013-1014 (1942); *American Oil Co. v. Norkus*, 358 Pa. 407, 67 A.2d 868 (1948) (*American Oil Company and American Oil Burner Service*); *American Shops v. American Fashion Shops*, 13 N.J. Super. 416, 423, 80 A.2d 575, 578 (Super. Ct. 1951), *cert. denied*, 7 N.J. 576, 83 A.2d, 379 (1951); *Rosenberg v. Rosenthal*, 135 Misc. 282, 284-285, 238 N.Y. Supp. 62, 64-65 (S. Ct. 1929). See *National Biscuit Co. v. Sheridan*, 44 F.2d 987, 988 (C.C.P.A. 1930) (*American Beauty*). Here the words "American Airlines" do not have a mere geographic meaning because, as Judge Ryan once observed, "words in the public domain may, through continued application to a specific . . . commercial activity, acquire an association with the user and the product or field so as to create a syndetic meaning for the word." *Conde Nast Publications v. Vogue School of Fashion M.*, 105 F. Supp. 325, 330-331 (S.D.N.Y. 1952).

Other leading cases on the use of geographic names as trade names are, *La Touraine Coffee Co. v. Lorraine Coffee Co.*, 157 F.2d 115 (2d Cir. 1946), *cert. denied*, 329 U.S. 771 (1946); *C. & W. Thum Co. v. Ackerman*, 257 Fed. 394 (6th Cir. 1919); *American Waltham Watch Co. v. United States Watch Co.*, 173 Mass. 85, 53 N.E. 141 (1899) (opinion by Judge Holmes).

Though the argument was rejected by the Board, the respondent argued that the name American is not entitled to protection because that word has been used in the names of three other air carriers (R. 206-207). The three uses referred to give no support to the respondent's argument.

(a) One such case was the use of the name "Air America" by another large irregular carrier like the respondent. As to this, the Board pointed out that it had a Section 411 proceeding pending in that case (R. 206). Since the Board's decision herein, the hotly contested Air America proceeding terminated with an order to cease and desist which was not appealed. The Board's findings in that case are worth examination, for they further delineate the seriousness to the public of the consequences of name similarity. See *Air America Section 411 Proceeding*, C.A.B.

Nor can there be doubt that the findings disclose confusion of the public. On occasion even a labor union, merchants, and the Post Office Department mixed up the two carriers, and there was revealed a constant stream of confused passengers and would-be

Order No. E-8470, June 24, 1954, mimeographed opinion pp. 5, 7-9, Appendix, pp. 13-22, 47-49.

(b) A second instance of use was that of "All American Airways" (R. 206). But that carrier is a small local service carrier (R. 206) and while using that name operated only quite limited feeder services emanating from Pittsburgh (R. 172, 300). Furthermore during most of the time during which it used that name it carried nothing but mail and express—and *no passengers*—with an experimental pick-up device (R. 172, 286-289). Some time after it began a regular passenger operation it changed its name to Allegheny Airlines (R. 292). *See* All American Certificate Renewal Case, C.A.B. Order No. E-7294, April 10, 1953, mimeographed opinion p. 4, n. 1, Appendix B, pp. 7-8; All American Suspension Case, 10 C.A.B. 24, 25-26, 35-36 (1949); All American, Pick-Up, Delivery Service, 2 C.A.B. 133, 134-137, 151-152 (1940). Whatever problem may have been created by its use of the name "All American" was eliminated before it became of any importance. *Cf.* Oregon-Washington Plywood Co. v. Federal Trade Commission, 194 F.2d 48 (9th Cir. 1952).

(c) The third use cited by respondent was that of "Pan American World Airways" (R. 206-207). That carrier operates only international and overseas service in areas quite distinct from the areas served by petitioner (R. 206-207); actually Pan American World Airways and American Airlines do not serve a single pair of cities in common. Moreover the former and the latter have been operating under their respective names since the very earliest days of air transportation; the record here is silent as to the extent, if any, of public confusion between them but it is reasonable to assume that, with their long standing operations in distinct areas, any such confusion would have become insubstantial. It is profitless to speculate as to what might be done were a real problem to emerge. *Cf.* Federal Trade Commission v. Algoma Co., 291 U.S. 67, 79, 81 (1934); Tillman & Bendel v. California Pack-

passengers, with some persons insisting even after explanation that the two carriers were the same.²⁰ In

ing Corporation, 63 F.2d 498, 505-507 (9th Cir. 1933), *cert. denied*, 290 U.S. 638 (1933).

In any event the fact of use of the name by others, as it was squarely held in *Galter v. Federal Trade Commission*, 186 F.2d 810, 814 (7th Cir. 1951), *cert. denied*, 342 U.S. 818 (1951), is no bar to a cease and desist order under Section 5 of the Trade Commission Act. And see *Federal Trade Commission v. Algoma Co.*, 291 U.S. 67, 80 (1934). *A fortiori* it is no bar here.

Even without the abundant evidentiary support that this record provides for the findings of the Board on the point, it is altogether apparent that the public understands that the petitioner's name, when used to identify an air service, means the petitioner and, as the Board found, does not merely signify "the airlines of this nation or continent generally" (R. 207).

Finally, it is pertinent to observe that the Board does not purport to prevent respondent from making use of the words "North American" in their geographic sense. If the respondent wishes to advertise to the public that it operates in North America or in America or that it is an airline of North American or of American nationality or location, it is fully privileged to do so.

²⁰ The findings of the Board are themselves quite extensive (R. 201-205, 221-223), but they summarize only a part of the evidence of actual public confusion established in the record. Thus, although the findings do summarize the incident in which an official of a labor union threatened to picket American because North American employed non-union labor (R. 222, 224, Exh. AA-4; R. 103, 154-155), the findings do not include the unchallenged fact that a San Bernardino attorney threatened to complain to the Federal Communications Commission about American's false advertising of fares until he subsequently discovered that he had heard radio advertisements of North American which he had confused with American (R. 20-21; Exh. AA-4; R. 103, 151-154). Similarly, the findings indicate that newspapers typically refer to petitioner as "American" (R. 206, Exh. AA-2; R. 102, 137-140), but they do not refer to the fact that three newspapers in Los Angeles erroneously reported that an American ticket office had been robbed, whereas in fact it was a North

the practical world of business, and especially in the rush of air transportation, it would be difficult to conceive of a clearer or more harmful case of public confusion from name similarity than is revealed in this case.

The Board did not speak idly when it held,

"The maintenance of high standards in dealing with the public is expected of common carriers, and the public has a right to be free of the inconveniences which flow from confusion between carriers engaging in the transportation of persons by air." (R. 208).

In fact, a basic objective of common carrier regulation is provision not only for public necessity but also for *public convenience*, and Section 411 is to serve that purpose just as are other provisions of the Civil Aeronautics Act.

American office (R. 28). Nor do the findings set forth the incident in which a group of men called American to settle a wager of money as to whether American and North American were, or were not, affiliated airlines (R. 91), and omitted is the incident in which a lady purchased a ticket on American, thinking it was North American, because a friend had told her that American in the past, had taken three days, instead of the scheduled few hours, to make a Chicago-Los Angeles trip (R. 61-63, Exh. AA-4; R. 103, 158-159). In short, the record is replete with case after case of actual confusion, and the Board's findings of confusion (R. 201-205) and probable confusion (R. 210) cannot be challenged.

III

THE COURT BELOW EXCEEDED PROPER BOUNDS IN HOLDING THAT IT COULD REVIEW AND REJECT THE BOARD'S DETERMINATION THAT THIS PROCEEDING "WOULD BE IN THE INTEREST OF THE PUBLIC".

The opinion of the court below reveals that it was moved by *Federal Trade Commission v. Klesner*, 280 U.S. 19 (1929), improperly to substitute its judgment for that of the Board as to what is "in the interest of the public".

Section 411 of the Civil Aeronautics Act contains two sentences. The first sentence states that the Board *may*, either on its own initiative or on complaint, "if it considers that such action by it would be in the interest of the public," investigate and determine whether a carrier is engaged in unfair or deceptive practices or unfair methods of competition. The second sentence is mandatory: if, after hearing the case, the Board finds that the carrier is engaged in such practices or methods the Board *shall* order such carrier to cease and desist therefrom.

The lower court read these sentences as though they stated that the Board might institute a proceeding and then, if it found an unfair practice or method, it should enter a cease and desist order only if such order is in the public interest. The court then interpreted the *Klesner* case to give it, the court, free reign to determine what is in the public interest.

We urge that the *Klesner* case, even if it still has vitality under Section 5 of the Trade Commission Act, is not applicable to Section 411 of the Civil Aero-

nautics Act, or, in any event, that the lower court erred in its interpretation of the *Klesner* case.

A. WHAT IS THE KLESNER CASE?

Doubtless because the *Klesner* case has been generally regarded in recent years as of minor if any importance²¹ there is a tendency to treat it rather loosely, and this tendency plainly led the lower court astray. Never until the present case has it been applied in any significant way. *Klesner* should be precisely measured.

The case arose under Section 5 of the Trade Commission Act. Subsection (a) of that Section directs the Commission to prevent unfair methods of competition (and, since 1938, unfair or deceptive acts or practices). Subsection (b) provides that when the Commission has reason to believe that a person is using an unfair method "and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public" it shall make charges, hold a hearing, and, if it finds such an unfair method, issue a cease and desist order.

In the *Klesner* case a vendetta was waged between two merchants in Washington, D. C., which began in November, 1915,²² a little over a year after adoption of the Trade Commission Act. Their controversy grew out of an admitted violation of an agreement between them resulting in threats of personal violence and leading to one's having the other arrested. Out

²¹ See Handler, Unfair Competition and the Federal Trade Commission, 8 GEO. WASH. L. REV. 399, 404 (1940).

²² 280 U.S. at 23.

of petty spite the latter began to use the trade name long in use by the other.²³ The senior user of the name promptly brought suit in the courts of the District of Columbia to enjoin the junior user. But on December 23, 1915, after answer to a rule to show cause and argument of counsel, the rule to show cause was dismissed. No further proceedings were had in that suit and it was finally dismissed four and a half years later, in May, 1920.²⁴ Then in December, 1920, the senior user of the name turned to the Trade Commission.²⁵ The Commission issued a complaint against the junior user, proceedings were held, and an order to cease and desist from using the name was entered in June, 1922.²⁶ It was not until May, 1924, that the Trade Commission brought action to enforce its order²⁷—nearly nine years after the fuss arose.

The Trade Commission's order was based on findings that customers had been confused. The Supreme Court, however, in holding that the Commission's order should not be enforced, pointed out that the Commission's action was not taken until years of this petty squabbling had elapsed and held:

²³ 280 U.S. at 24, 28. See also *Federal Trade Commission v. Klesner*, 25 F.2d 524 (D.C. Cir. 1928).

²⁴ 280 U.S. at 29, n. 7. There was an obvious question as to whether the particular trade name was anything other than descriptive of the business the parties were engaged in and therefore not entitled to protection. See *Federal Trade Commission v. Klesner*, 25 F.2d 524, 525 (D.C. Cir. 1928).

²⁵ 25 F.2d at 524; 280 U.S. at 23.

²⁶ 280 U.S. at 23.

²⁷ 280 U.S. at 23.

"Whatever confusion had originally resulted from Klesner's use of the words must have been largely dissipated before the Commission first took action. If members of the public were in 1920, or later, seriously interested in the matter, it must have been because they had become partisans in the private controversy between Sammons and Klesner." 280 U.S. at 29.

The Court then determined that under Section 5 of the Trade Commission Act a complaint could be issued only if it appeared to the Commission that a proceeding "would be to the interest of the public" and that if at any time during the proceeding it developed that the facts show "that the proceeding which it authorized is not in the public interest" the Commission should dismiss the complaint. 280 U.S. at 30. In this case the Court held that the facts developed at the hearing "show affirmatively the private character of the controversy" and therefore that the complaint had been improvidently issued and should have been dismissed. *Idem*.

At most, therefore, the *Klesner* case holds merely that, when the facts as developed disclose only a private squabble and an effort by a disappointed litigant to find a forum after his appeal to the civil courts had failed, the Commission should drop its proceeding as improvidently begun.

B. THE RULE OF THE KLESNER CASE SHOULD BE RECONSIDERED AND IN NO EVENT SHOULD IT BE APPLICABLE TO SECTION 411 OF THE CIVIL AERONAUTICS ACT..

There can be no question as to the wisdom of the rule that the Trade Commission should be actuated by a desire to protect the public and should not lend its process simply to the settlement of a private grudge.

The difficulty with the *Klesner* case, however, is that it asserts the power of judicial review on the issue as to whether a Commission investigation would be "to the interest of the public". This would inject the courts into an area of inquiry peculiarly administrative in character and inappropriate for judicial examination. In a sense the Commission's function in applying the statutory phrase—"if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public"—is not unlike the function of the Department of Justice in determining whether an anti-trust proceeding should be instituted. Compare *United States v. Morton Salt Co.*, 338 U.S. 632, 640 *et seq.* (1950). The function, in short, is one essentially executive in character and hardly, if at all, susceptible to the kind of determination which courts are equipped to make.

This is the reason, no doubt, that in the quarter century since the decision in the *Klesner* case it has been of little, if any, significance save to evoke an occasional form of words in judicial opinions. See, e.g., *Parke, Austin & Lipson v. Federal Trade Commission*, 142 F.2d 437, 441 (2nd Cir. 1944), cert. denied, 323 U.S. 753 (1944). And it is not hard to understand why Judge Learned Hand observed, of the *Klesner* case, that ". . . it is doubtful whether today the same answer would be given". *Moretrench Corp. v. Federal Trade Commission*, 127 F.2d 792, 795 (2nd Cir. 1942).

It is suggested, therefore, that the decision in the *Klesner* case that the issue of what "would be to the

interest of the public" is justiciable should now be reconsidered.²⁸

In any event, it surely would be going too far to hold, as did the lower court, that such an issue under Section 411 of the Civil Aeronautics Act is justiciable. That section is in a context very different from that of Section 5 of the Trade Commission Act. The difference in context is strong reason for refusing to apply the *Klesner* precedent to the Civil Aeronautics Act.

Whereas the Federal Trade Commission, under its Act, is dealing with miscellaneous business enterprises throughout our economy, under the Civil Aeronautics Act the Civil Aeronautics Board applies itself to the highly specialized questions of the air transport industry and is intended by Congress to have an expertness and to be relied upon in the application of the Act to a degree which could never be possible of an agency such as the Federal Trade Commission having only a sort of roving commission over the whole field of business.

One of the very premises of the Civil Aeronautics Act is that an air carrier and its way of doing business are necessarily of concern to the public to a degree not at all true of ordinary commercial companies. That is the reason for the requirement of certificates of public convenience and necessity, for the detailed regulation of rates, practices, services, interlocking relationships, and so forth. That may be the reason, moreover, that under Section 411 provision is made for a private

²⁸ Mr. Gerard C. Henderson, in his landmark work in 1924, viewed the public interest issue as not subject to court review. THE FEDERAL TRADE COMMISSION 53-54

carrier to become a complainant, a provision for which there is no counterpart in Section 5 of the Trade Commission Act.

Moreover, it is one thing to say that a court might be equipped to determine whether there is any interest on the part of the public in a squabble between two shade shops in Washington, D. C.; it is quite another thing to suggest that a court is equipped to measure the extent of the public's interest in a particular practice affecting the complex, dynamic and esoteric air carrier industry with which the Civil Aeronautics Board is concerned every minute of every day. It is submitted that the lower court undertook to cope with a question with which it is not equipped to cope and with which Congress never intended that it should be concerned.

C. EVEN IF THE KLESNER CASE WERE APPLICABLE THE LOWER COURT MISAPPLIED IT.

Even if the *Klesner* case were to have any bearing on a Section 411 proceeding the lower court plainly misconceived its appropriate application.

At most the *Klesner* case could mean only that when Section 411 says that the Board may proceed "if it considers that such action by it would be in the interest of the public" the Board's determination must be made in good faith and it must be inspired by considerations relating to the public rather than responding simply to a private grudge.

The facts in the present case as found by the Board and as disclosed in the record overwhelmingly demonstrate that, in good faith, the Board was prompted by considerations of public concern.

As shown in its Business Name Regulation a serious public problem had arisen, especially among large irregular carriers, of which the respondent is one, affecting the public very directly. See *supra*, p. 8. Then when the question of respondent's use of the North American name came to the Board's attention, the Board considered the matter for some three months before determining to institute its investigation, a consideration which dealt not only with the various pleadings but also with "evidence by way of affidavits" (R. 3, 5). This determination to commence the proceeding was not contested by the respondent in the court below. Indeed, the particular issue dealt with in the *Klesner* case—that is, *whether the facts disclose that the initiation of the proceeding was warranted*—was not even presented by the respondent to the lower court. (R. 307; see *supra*, p. 15).

Then after an exhaustive hearing and in agreement with its Examiner, who had observed the witnesses and heard the evidence, and whose Initial Decision disclosed a full realization that the Board is concerned with the interest of the public (R. 197-198, 418), the Board specifically and in much more than formal or casual detail related the interest of the public to the problem it dealt with. See *supra*, pp. 13-14.

That interest is manifest. Air transportation does not work even today with the smoothness of older forms of surface transportation, as the scene at any airport will testify. Thousands upon thousands—even millions—of passengers are either wholly or relatively unsophisticated in the ways of the airlines, whether the older scheduled carriers or the newer irregular carriers. The rush and confusion at airports, the

difficulties of making reservations on overtaxed telephone lines, the ever present uncertainty as to exactly when a plane will leave or arrive, or whether, because of weather or otherwise, it will have to land at an "alternate" airport instead of its regular airport, these and many other characteristics peculiar to the air carrier industry present altogether sufficient difficulties. To inject into this picture the additional element of confusion, delay, misunderstanding, and inconvenience, resulting from name similarity, and leading to calling the wrong carrier, checking at the wrong counter, meeting the wrong plane, and the other problems recited by the Board, is certainly of sufficient concern to the public to testify to the Board's good faith in instituting and carrying through this proceeding.

The lower court, however, examined the case, and applied the *Klesner* decision, without any regard for these considerations. It read Section 411 as though that section stated that the Board could enter a cease and desist order only "if it finds a practice or method of competition contrary to the public interest". That is not what the statute says—but even if it did neither it nor the *Klesner* case gives a court any warrant to substitute its judgment for that of the Board as the lower court did in this case. Compare *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 141-144 (1940); *Gray v. Powell*, 314 U.S. 402, 412, 413 (1941); *Universal Camera Corp. v. Labor Board*, 340 U.S. 474, 488 (1951).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below must be reversed and the order of the Civil Aeronautics Board affirmed.

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